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No. 04-174

Supreme Court, U.S.
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In The Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. A Conflict Between the Circuits Exists, and a Review of the Fourth Circuit's Opinion Is Necessary to Resolve the Conflict Between the Circuits

ETNG's assertion that no conflict between the Fourth and Seventh Circuits exists is based on its mistaken analysis of the Seventh's Circuit's opinion in Northern Border Pipeline Company v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998). ETNG cannot and did not identify any part of the opinion in Northern Border that distinguishes or reconciles the Seventh Circuit's opinion with the Fourth Circuit's opinion in this case. ETNG asserts that Northern Border is distinguishable because the Northern Border Pipeline Company ("NBPC") "had not obtained an order determining that it had a right to condemn before it sought injunctive relief." Br. in Opp'n at 6. As the Fourth Circuit, however, ETNG can point to no language in the Seventh Circuit's opinion which states that NBPC did not have the right to condemn property for its pipeline or that NBPC had not obtained an order determining that it had the right to condemn the subject property. To the contrary, the court in Northern Border specifically addressed the fact that NBPC had the power to condemn property for its pipeline. What NBPC disavowed was any claim to immediate possession based in substantive law. "On appeal, [NBPC] does not contest the district court's conclusion that its claim to immediate possession has no basis in substantive federal or state law." Northern Border, 144 F.3d at 471. It is the lack of substantive statutory law supporting a claim for immediate possession on which the Seventh Circuit relied and over which the Fourth Circuit glossed.

The Seventh Circuit expressly stated that NBPC had a right to condemn before it sought injunctive relief. The Seventh Circuit correctly noted that a gas company obtains the right to condemn at the moment FERC grants it the power of eminent domain to take property for a particular

project. Id. at 470. "Under the Natural Gas Act . . . issuance of the certificate [from FERC] to Northern Border carries with it the power of eminent domain to acquire the necessary land." Id.

The Seventh Circuit reached a different result than the Fourth Circuit because the Seventh Circuit correctly recognized the difference between the right to take (i.e., the ordinary power of eminent domain or slow-take power) and the additional right to seize immediate possession of property before providing the owner with just compensation (i.e., the extraordinary quick-take power of eminent domain). The gas company in Northern Border possessed the ordinary power of eminent domain, but it did not possess the additional and extraordinary quick-take power. Recognizing this difference, the Seventh Circuit upheld the district court's ruling that "[NBPC] has no legal right to immediate possession under . . . federal substantive law." Id. at 471. The Seventh Circuit explained that while a gas company's right to take property vests when FERC issues it a certificate, a company's "rights to the [owner's] land do not vest when the FERC issues it a certificate." Id. at 472.

Contrary to ETNG's assertions, the Seventh Circuit based its decision on the gas company's "lack of quick-take authority." Id. As that court stated, "[b]ecause [NBPC] disavows any claim that it has a substantive entitlement to the defendant's land right now, rather than an entitlement that will arise at the conclusion of the normal eminent domain process, [NBPC] is not eligible for the [injunctive] relief it seeks." Id. at 471. Because Congress has not granted private gas companies the quick-take power, a gas company's power or right to take possession of the property does not vest until after the conclusion of the eminent domain process and payment of judicially determined just compensation. A reading of Norther Border reveals that any

attempt at distinguishing the Seventh Circuit's opinion in Northern Border from the Fourth Circuit's decision herein is unsupportable.

II. The Jurisprudential Distinction Between a Congressional Grant of the Quick-Take Power and a Judicial Grant of the Quick-Take Power in the Form of an Injunction Is Fundamental to this Appeal

ETNG argues that the district court in this case did not grant the quick-take power because the court granted an injunction. Br. in Opp'n at 13-14. ETNG's argument ignores the purpose, effect, and nature of the injunctive relief granted in this case. In substance, the district court gave ETNG a power and right that Congress had not.

First, the purpose and effect of the injunction granted in this case is identical to that of a congressional grant of the quick-take power—both give the gas company the power and authority to seize possession of an owner's property before providing the owner with just compensation. Second, the court granted powers of eminent domain which belong to Congress. The court, not Congress, thereby prescribed the manner in which ETNG is authorized to exercise its power of eminent domain. While the purpose and effect of the quick-take power and an injunction are similar, the significant difference is that Congress grants the authority or power in one instance and the court grants the authority and power in the other instance. Moreover, a congressional grant of quick-take power does not involve the immediate application of a court's contempt powers as does an injunction.

With the quick-take power, Congress grants a condemnor the power to have immediate possession of property before providing the owner just compensation. See, e.g., 40 U.S.C. § 3114. With an injunction, the court has

granted condemnor the power to seize immediate possession of property before providing the owner just compensation. Br. in Opp'n at 14. With the quick-take power, Congress as the legislative branch of government prescribes the manner in which a gas company must exercise its power of eminent domain. With an injunction, the judicial branch of government prescribes the manner in which a condemnor may exercise its power of eminent domain.

This critical distinction is fundamental to the Petitioners' appeal. Courts are not authorized to grant legislative powers of eminent domain, regardless of the form (i.e., injunction). To hold otherwise ignores the constitutional separation of powers and grants to the judiciary powers that the Constitution vests in Congress.

The Petitioners do not dispute the fact that Congress may grant a condemnor the power to seize possession of property before providing just compensation to the owner. The Petitioners dispute only that courts are not authorized to grant this power. Congress, not courts of equity, determines when a condemnor has the power or right to seize possession of property by the power of eminent domain.

From this Court's earliest opinions upholding a condemnor's power to seize possession before payment of just compensation, this Court has recognized that the legislature must grant this extraordinary power to seize possession of an individual's property before providing just compensation. As this Court acknowledged in Sweet v. Rechel, "it is competent for the legislature, in the exercise of . . . its power to appropriate private property for public uses, to authorize the city to take the fee in the lands . . . prior to making compensation." 159 U.S. 380, 407 (1895) (emphasis added).

Congress has not granted ETNG the quick-take power, which would authorize ETNG to seize immediate possession of the Petitioners' property before providing just compensation to the owner. Although Congress has granted this power to other condemnors, it has withheld this extraordinary power from private gas companies. See, e.g., 40 U.S.C. § 3114. Thus, ETNG's right to seize possession of the Petitioners' property does not vest until after the normal condemnation process and payment of just compensation. See, e.g., Northern Border, 144 F.3d at 471-72. Contrary to ETNG's allegations, the constitutional separation of powers prohibits courts from granting to private gas companies legislative powers of eminent domain, even if such grant is in the form of injunctive relief under Rule 65 of the Federal Rules of Civil Procedure or otherwise.

III. Courts of Equity Are Not Authorized to Invade the Province of the Legislature By Granting Powers Belonging to Congress

ETNG's argument misapprehends the scope of the courts' equitable powers when such powers impinge upon the legislature's exercise of its eminent domain powers. Because Congress has not granted ETNG the quick-take power, ETNG asked the court to use its equitable powers to grant ETNG the quick-take power. ETNG asserts that courts may grant the quick-take power in the form of injunctive relief because "a court will presume the availability of all remedies unless Congress has expressly provided to the contrary." Br. in Opp'n at 8. ETNG's argument fails to contemplate the difference between using equity to craft remedies for existing rights and using equity to create new or non-existing rights or to grant legislative powers of eminent domain.

Here, the court did not simply craft a remedy for an existing right. Instead, the court granted ETNG new powers and rights that Congress had withheld from private gas companies. Congress has not granted ETNG the quick-take power, and, therefore, ETNG asked the court to grant it such power in the form of an injunction.

ETNG further states that this Court "will not lightly assume Congress has stripped courts of their equitable jurisdiction [and that] a departure from equity requires a clear and valid legislative command." Br. in Opp'n at 8. This assertion misapprehends the merits of the Petitioners' position. The Petitioners argue that courts of equity have never had jurisdiction to grant legislative powers belonging to Congress which controls, exercises, and delegates the power of eminent domain. The constitutional separation of powers prohibits courts of equity from granting legislative powers. Instead of asserting that Congress stripped courts of equity of jurisdiction that it once had, the Petitioners assert that, under the Constitution, courts of equity never had jurisdiction, power, or constitutional authority to grant legislative powers of eminent domain.

ETNG relies upon Franklin in which this Court "held that a plaintiff had a private cause of action pursuant to 20 U.S.C. §§ 1681-88 (Title IX) even though a private right of action is not expressly set out in the statute." Br. in Opp'n at 8-9. ETNG states that courts of equity may use equitable remedies even when a statute is silent as to a particular remedy and when the remedy is "not spelled out in the statute." Br. in Opp'n at 8-9. The plaintiff in Franklin had a fully vested right to be free from discrimination based on gender in higher education institutions receiving federal funds, and Franklin did not involve legislative powers belonging to Congress. The power or right that Congress has given ETNG is inchoate under the Natural Gas Act. The power or right of ETNG to take possession of an

individual's property is not ripe until congressionally mandated procedures are completely and thoroughly followed. ETNG continues to gloss over the fact that the case sub judice is an eminent domain case involving constitutional and jurisprudential limitations and circumscription of governmental condemnation power.

Congress has never entrusted the quick-take power of eminent domain to the courts. Under the rationale that ETNG offers and the district court and Fourth Circuit embrace, courts of equity are authorized to grant to condemnors any legislative powers that Congress has not expressly prohibited courts of equity from granting. If in the area of eminent domain law congressional silence is interpreted as an affirmative grant of legislative power to courts of equity, courts may grant any legislative powers that Congress has not expressly prohibited courts from granting. Such an interpretation wreaks havoc on our constitutional structure of government and will have far-reaching implications beyond the purview of eminent domain.

IV. ETNG Fails to Acknowledge the Unique Nature of Eminent Domain

ETNG's argument is fatally flawed because ETNG ignores the rule that eminent domain is a legislative power and that the legislature prescribes the manner and means for the exercise of such power. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). ETNG states that "once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative." Br. in Opp'n at 10. When Congress grants the power of eminent domain to a condemnor, it is true that the condemnor does obtain some discretion as to which property it will take. However, the manner in which the power of eminent domain must be exercised depends exclusively on legislative action. The

legislature always prescribes and controls the manner in which the power of eminent domain must be exercised. It is for this reason that this Court has permitted a condemnor to exercise the quick-take power only when Congress has authorized a condemnor to take property in that manner.

ETNG argues that the Petitioner's reliance on Youngstown is misplaced. Br. in Opp'n at 9. This argument fails. Youngstown demonstrates that even the President of the United States cannot take property through the power of eminent domain except in the manner Congress prescribes. In Youngstown, the President had seized possession of steel mills through an Executive Order. 343 U.S. at 582. The mill owners argued that "the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not the President." Id. Arguing on behalf of the President's actions, Secretary of Commerce, Charles Sawyer, contended that "Congress has taken no action [indicating that it disapproves the President's actions]." Id. at 583. Secretary Sawyer further argued that failure to seize possession of the steel mills "would so endanger the well-being and safety of the Nation that the President had inherent power to do what he had done." Id. at 584.

The President possessed the power of eminent domain. Id. at 585-86; see also 40 U.S.C. § 3113. He sought to seize immediate possession of property because the statute authorizing him to take property was "much too cumbersome, involved, and time-consuming for the crisis which was at hand." Id. at 586. Congress had not authorized the President to seize immediate possession of property in the manner he did. This Court noted that "[t]here is no statute that expressly authorizes the President to take possession of property as he did here." Id. at 585. In fact, Congress had "rejected an amendment which would have authorized such governmental seizures." Id. at 586.

This Court then held that the President was not authorized to seize immediate possession of property as he had in Youngstown because Congress had not authorized the President to take property in the manner he did in that case. Id. at 585, 589. "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." Id. at 588. The Court noted that Congress had the power to authorize the President to seize immediate possession of property for public use, but Congress had not authorized the President to do so.[1] Id. However, because Congress had not authorized the President to seize immediate possession of property, this Court held that he had no authority to do so.

As this Court stated in Youngstown, "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." Id. at 589. Consequently, neither the President nor the courts can usurp the law making power of Congress, including the power to prescribe the manner in which the power of eminent domain is to be exercised by a condemnor to whom Congress has delegated such power. As in Youngstown, Congress has not granted ETNG the quick-take power, which would thereby authorize it to seize immediate possession of property before the conclusion of the condemnation process and payment of just compensation. See, e.g., Northern Border, 144 F.3d at 471-72. The President could not seize immediate possession in the absence of congressional authorization allowing such action, and ETNG is likewise prohibited from taking property in a manner not authorized by Congress.

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[1] "The power of Congress to adopt such policies as those proclaimed by the [President's] order is beyond question." Youngstown, 343 U.S. at 588.

ETNG took exception with the Petitioners' citation of Johnson, which states that "inherent power wielded by life-tenured judges without authorization in statute over the basic functions of a sovereign state simply go too far." See Br. in Opp'n at 11. This statement acknowledges that federalism prohibits judges from using equity to improperly invade the province of the states. Likewise, the constitutional separation of powers prohibits judges from using inherent equitable powers, without authorization in statute, to invade the province of Congress. The fundamental danger to the principles of federalism that Johnson identifies is equally a threat to preserving the separation of powers under the Constitution. The Fourth Circuit's decision makes the danger all the more real.

Conclusion

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the Petitioners respectfully submit that this Court should grant their Petition for Writ of Certiorari.

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